

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA**

ANDRE JACOBS,)	
)	
Plaintiff,)	
)	
v.)	CIVIL ACTION No. 07-237
)	Judge Joy Flowers Conti
)	Magistrate Judge Bissoon
DEBORAH BAYHA, <i>et al.</i> ,)	
)	
Defendants.)	

MAGISTRATE JUDGE'S REPORT AND RECOMMENDATION

I. RECOMMENDATION

It is respectfully recommended that the Motion to Dismiss filed by Defendants (Doc. 42) be denied.

II. REPORT

Plaintiff Andre Jacobs is a state prisoner who was granted leave to proceed *in forma pauperis* in this matter on April 4, 2007 (Doc. 6). Defendants now move to dismiss asserting that Plaintiff was improvidently granted leave to proceed *in forma pauperis*. More specifically, Defendants assert that Plaintiff has run afoul of the provisions of 28 U.S.C. § 1915(g):

In no event shall a prisoner bring a civil action or appeal a judgment in a civil action or proceeding under this section if the prisoner has, on 3 or more occasions, while incarcerated or detained in any facility, brought an action or appeal in a court of the United States that was dismissed on the grounds that it is frivolous, malicious, or fails to state a claim upon which relief may be granted, unless the prisoner is under imminent danger of serious physical injury.

Defendants detail four lawsuits and appeals which, they assert, count as “strikes” for purposes of § 1915(g). While the first two cases appear appropriate for the analysis, the third and fourth proposed strikes are two appeals filed by Jacobs that were dismissed for failure to pay the filing

fee, i.e., for failure to prosecute. A dismissal for failure to prosecute does not qualify as a “strike” for purposes of § 1915(g), because it is not an indication that the case was frivolous, malicious, or that the Plaintiff failed to state a claim upon which relief may be granted. Butler v. Department of Justice, 492 F.3d 440, 443 (D.C. Cir. 2007). The final two proposed strikes in this case must be rejected as such, and there is no bar to Plaintiff proceeding *in forma pauperis*.

It is recommended that the Motion to Dismiss filed by Defendants (Doc. 42) be denied. In accordance with the Magistrates Act, 28 U.S.C. § 636(b)(1)(B) and (C), and Rule 72.1.4 (B) of the Local Rules for Magistrates, objections to this Report and Recommendation are due by May 28, 2009.

May 11, 2009

s/Cathy Bissoon
Cathy Bissoon
United States Magistrate Judge

Cc:
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